



**Esmail v Bell (Environment & Land Case E087 of 2021)
[2022] KEELC 12808 (KLR) (4 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 12808 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E087 OF 2021
FM NJOROGE, J
OCTOBER 4, 2022**

BETWEEN

SALEEM ESMAIL PLAINTIFF

AND

MALCOM JOHN BELL DEFENDANT

RULING

1. This is a ruling in respect of the question as to whether costs are to be awarded to the Defendant after the Plaintiff withdrew the entire suit.
2. On 2/03/2022 the Plaintiff through his Advocate withdrew the entire suit against the Defendant and subsequently parties recorded a consent that the suit be marked as withdrawn and that the parties were to agree on the issue of costs and report back to court for recording of a consent on costs.
3. On 17/05/2022 when the matter came up for mention, parties indicated that they had failed to reach an agreement on costs and the court directed that both parties file their submissions on the same.

SUBMISSIONS

4. The Defendant filed his submissions dated 15/06/2022 on 16/06/2022 where he identified the following two issues for determination; One, whether he is entitled to costs of the suit and two, whether he is entitled to costs of the three (3) months the Plaintiff was in use and exclusive possession of the eighty (80) acres on the weight of the court order.
5. On the first issue, the Defendant submits that it is a fact that the Plaintiff withdrew the instant suit and that upon withdrawal of a suit under Order 25 Rule 1 of the *Civil Procedure Rules*, 2010, it is automatic that the provisions of Order 25 rule 3 of the said Rules apply. He relied on Section 27 of the *Civil Procedure Act* and submits that he is entitled to costs and interest of the suit. He cited a number of



authorities including *Gladys Mukwalu Marangu & Another V Emilio Marangu M'ndiri & Another* [2008] eKLR.

6. Regarding the second issue, the Defendant submits that the lease between the two parties had been terminated by effluxion of time on 31/12/2021 upon the lapse of its five (5) year term. He further submits that two weeks' prior, the present suit had been filed and the Plaintiff on 17/12/2021 obtained temporary injunctive orders that allowed him exclusive possession of eighty (80) acres of the suit property. He argues that the said orders were in force until the withdrawal of the suit and that therefore meant that the Plaintiff utilized the 80 acres of the suit land for 3 months until when he undertook the harvest and thereafter withdrew the suit.
7. The Defendant further contends that the three months' rent to date were never paid which rent he is entitled to and calculated as follows;

Rent payable per acre Kshs. 12,000 per annum for three months (Kshs. 12,000 * 3/12 * 80 acres = Kshs. 240,000)
8. He submits that he is therefore entitled to Kshs. 240,000 for the time the Plaintiff was in use and exclusive possession of the 80 acres.
9. The Plaintiff did not file his submissions.

ANALYSIS AND DETERMINATION

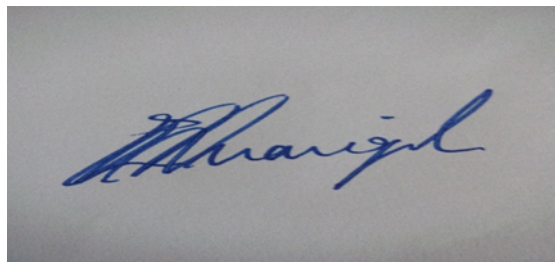
10. This court has considered the submissions and perused through the record and the main issue for determination is whether the Defendant is entitled to costs of the suit.
11. Order 25 Rule 2 of the Civil Procedure Rules provides as follows:
 - “ 1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all the parties wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
 - 2(1). Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
 3. Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”
12. The Supreme Court in *Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others* (2014) eKLR interpreted the law in this area in the following words:
 - “It emerges that the award of costs would normally be guided by the principle that costs follow the event: the effect being that the party who calls forth the events by instituting the suit will bear the costs if the suit fails, but if this party shows legitimate occasion by a successful suit, then the defendant or respondent will bear the costs.”
13. In the present suit it is not in dispute that the Plaintiff filed an application seeking temporary injunction which the Defendant in response filed a replying affidavit. It is also on record that the Defendant



entered appearance and filed its respective Defence and Counterclaim to the Plaint. Furthermore, it is also evident from the record that the application dated 14/12/2021 was heard and determined. All the above were clearly steps taken by both parties to advance their cases.

14. This court while appreciating that the main suit had not been set down for hearing, I have considered the fact that there were appearances and actual prosecution of some applications in court which must have involved preparations on the part of the Defence counsel. In view of the foregoing, it is this court's view that the defendant expended costs in the matter up to the point of withdrawal of the suit.
15. The Defendant also raised the issue of costs of the three (3) months the Plaintiff was in use and exclusive possession of the eighty (80) acres. This court is of the view that the said costs cannot be granted as the Defendant never expressly pleaded the same in his Defence and Counter-claim. Furthermore, parties are bound by their pleadings and therefore the said costs are clearly an afterthought which if the Defendant had genuinely sought, he could have expressly indicated it in his pleadings. Nevertheless, that submission has brought into sharper focus the fact that the plaintiff was utilizing and benefitting from the use of the defendant's land as the suit continued.
16. In the upshot, this court in the circumstances finds that the Defendant is entitled to costs of the withdrawn suit to be assessed under the provisions of the Advocates Remuneration Order that relate to suits that have not been set down for hearing.

Dated, signed and issued at Nakuru via electronic mail on this 4th day of October, 2022.



**MWANGI NJOROGE
JUDGE, ELC, NAKURU**

